Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1943.

No. 156

PETER W. BURNS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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October Term, 1943.

PETER W. BURNS,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

PETER W. BURNS, the above named petitioner, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit on which decision was rendered on the 19th day of May, 1943, affirming the judgment of the United States District Court for the Southern District of New York, in the City of New York, State of New York, convicting petitioner, and others, of transporting or causing to be transported in interstate commerce securities alleged to be theretofore stolen and of a value of $5,000.00, in violation of Title 18, United States Code, Section 415, and of conspiring to violate such statute contrary to Title 18, United States Code, Section 88.

The mandate of the Circuit Court was filed in the office of the clerk of the United States District Court for the

Southern District of New York on the 8th day of June, 1943. Petitioner is at present confined serving the sentence imposed.

Statement.

The indictment alleged that between the 1st day of January, 1937, and the 8th day of February, 1937, both dates inclusive, petitioner, and five others, unlawfully, wilfully, and knowingly did transport and cause to be transported in interstate commerce from the City of Minneapolis, Minnesota, to the City, State and Southern District of New York, certain securities of the value of $5,000.00 and more, which had theretofore been stolen from the office of the Clerk of the United States District Court in Minneapolis, Minnesota; and with conspiring to transport such securities in interstate commerce with knowledge that they had been stolen. The second or conspiracy count of the indictment alleged the commission of certain overt acts between the 3rd and 11th days of February, 1937.

Brief Summary of Case.

At the opening of the case the petitioner defendant Peter W. Burns asked for a severance particularly directed as to a severance against Chester G. Bollenbach. The said Chester G. Bollenbach having been denied a continuance of the trial, was thereupon allowed to open as his defense, see appendix, (B).

The petitioner herein, Peter W. Burns had contended that he was in no way connected with any of the other defendants, in the alleged crime, yet in his opening the said Chester G. Bollenbach attempted to defend the said

Peter W. Burns asserting that the District Attorney trying the case, and the Federal Investigator in charge of the case, had, as far as Peter W. Burns was concerned, been guilty of wrong conduct in that they approached a woman friend of the said Peter W. Burns, and attempted to terrorize her into testifying against the said Peter W. Burns. By which conduct of the said Chester G. Bollenbach, the jury was at once notified that there was some connection between Burns and Bollenbach, and as a result of the violence of the opening of the said Chester G. Bollenbach, the trial judge committed him and adjudged him in contempt. Later there was a severance, but the damage had been done as far as the jury was concerned, showing the jury had heard that there was some connection between Chester G. Bollenbach and Peter W. Burns. Yet the Trial Court did not discharge the jury but permitted the same jury to continue with the trial of the case as against Peter W. Burns, over the objection of the said Peter W. Burns. During the course of the trial Bollenbach was called into the Courtroom for the purpose of permitting a witness to make an identification, and by reason of his conduct at that time, Bollenbach in the presence of the jury, was again held to be in contempt and sentenced to a further term of three months. (fol. 152.)

For upward of ten years prior to the filing of the indictment petitioner was engaged in the purchase and sale of stockholders' lists at 15 William Street, New York City, under the firm name of Bond & Share List Company. These lists were secured either by purchase or by making copies of public and Court records. (fols. 2063, 2064).

The Government offered testimony to the effect that in January, 1935, the gold notes described in the indictment

were seen to be on file in the office of the Clerk of the United States District Court in Minneapolis. (fols. 127-132).

In April, 1937, an Order was entered in the United States District Court in Minneapolis, directing the return of bonds filed by various claimants. (fol. 140). At that time a search was made of the files for the purpose of locating bonds that were filed, and it was then discovered that the bonds were missing. (fols. 148, 149.) Chell M. Smith, a deputy clerk of the United States District Court at Minneapolis, testified that he recalled that in January, 1937, a man came to the courthouse and made an examination of the files. (fol. 146.) Thereafter, and in May, 1941, Smith was in the United States Courthouse, Southern District of New York, and identified a man who he claimed was the one who examined the files in Minneapolis. This man was identified by him as being BOLLENBACH. (fols. 149-151.)

No testimony was offered, nor was any attempt made to show that the bonds were in the files subsequent to January of 1935, nor was there any evidence offered to show that BOLLENBACH, or any of the other defendants, took the bonds from the files.

On February 3rd ten of the bonds are alleged to have been delivered to Hart Smith & Co., securities dealers, for the purpose of being sold. (fol. 309.) On delivery of the bonds to Hart Smith & Co. a check for $2500.00 was issued to "Arnold Berendson", payment on which was thereafter stopped. (fols. 312 and 370.) Although petitioner was charged in the indictment using the alias "Arnold Berendson" the only proof in connection with this name was that the same was used by BOLLENBACH.

Subsequently, on February 5th, 1937, defendant, TURLEY, introduced BOLLENBACH who was then using the name, "Brown" to the defendants, BLASER and INGALLS. "Brown" said that he had 15 bonds that he wanted to sell. (fols. 513-516.) The following day "Brown" brought 15 bonds to BLASER and INGALLS which they sold for him. (fol. 541.)

Petitioner admitted that in January, 1937, he was in Minneapolis, where he went in connection with the recapitalization of the Minneapolis Gas Light Company. After being away from New York for two and a half months he returned in February, 1937. He also admitted knowing both TURLEY and BOLLENBACH, and had previously sold some lists to TURLEY and had purchased some lists from him. (fols. 2065-2071.) He further denied that he saw BOLLENBACH while he was in Minneapolis, (fol. 2121) or that he discussed his trip with TURLEY before leaving New York. He admitted talking to TURLEY by telephone from Chicago with reference to some lists, although he denied that TURLEY knew that he was going to make the trip before he started. (fols. 2133, 2134.)

There is no proof that petitioner knew Bollenbach was in Minneapolis, or that he even knew of the existence of the bonds, much less that they were in the files, if they were, nor is there any proof that petitioner took the bonds from the files or that he transported them to New York or elsewhere, or that he did anything in connection with them at any time.

During the course of the trial there was read into the record in the presence of the jury the testimony of the defendant, Jacobson, before the Grand Jury. (fols. 902-937.)

Although this testimony was received only as against Jacobson (fols. 905, 906), it contained prejudicial and detrimental statements affecting petitioner. By reason thereof motions were made for a severance of the trial, but these motions were denied. (fols. 937-938.)

The Government's case occupied 669 pages of the record, of which approximately half was consumed in showing that the defendant, Turley, had previously been engaged in other transactions concerning the reception of stolen goods and fraudulent transactions, in none of which petitioner was involved, nor in any way connected. It may be pointed out that there was no direct evidence at any time to connect petitioner with the matters alleged in the indictment, and that in order to reach its verdict the jury was compelled to rely upon inference and supposition and that the Circuit Court not only condoned this, but did likewise in reaching its decision.

The bonds in question, according to the Government's evidence, came to rest in New York some time prior to February 3rd, 1937, the date of delivery to Hart Smith & Co. Any evidence, therefore, of overt act committed subsequent to that time was improper and could not constitute evidence of a conspiracy, since the conspiracy to transport in interstate commerce must necessarily have come to an end prior to that time.

It is submitted that prejudicial error of great magnitude was committed by the Trial Court when it charged the jury as follows:

> "It is not necessary at all for Turley or Jacobson to be out in Minneapolis at all. In saying what I am about to say please do not feel that I am expressing any view held by myself, but I am trying to illustrate

to you. Let us say for example Turley agreed to finance Bollenbach and Burns in going out to steal these bonds in Minneapolis, knowing that they were there in the clerk's office. He would be as guilty then if they brought back the bonds to Turley in New York as if Turley was out in Minneapolis, because they would be acting for him in this work.

"It is not for me to say, and I don't mean to indicate, as I said a moment ago, that that was the fact; but you are entitled to take all these circumstances into account in coming to a conclusion whether this is a planned theft or transportation of these bonds." (fols. 2477, 2478.)

Petitioner respectfully submits that by reason of the foregoing he was denied trial according to due process of law.

Questions to be Presented.

1. Whether the said Peter W. Burns by reason of the fact that the jury was not discharged and was allowed to continue with the case after the contempt by Bollenbach, had a fair and impartial jury.

2. Whether the admission of testimony of alleged crimes committed by the defendant Turley, with which the said Peter W. Burns had no connection, and which crimes were not of like nature with that charged in the indictment, error was committed in the trial of the said Peter W. Burns. (fols. 1367-1406.)

3. Whether or not any competent evidence was adduced to prove the crimes charged in the indictment, or to support the judgment of conviction.

4. Whether or not due process of law was accorded petitioner in view of the fact that the judgment was predicated wholly on inferences and suppositions.

5. Whether or not petitioner was deprived of his constitutional right of being confronted by the witnesses against him as a result of the reading into evidence of the testimony of the defendant, JACOBSON, given before the Grand Jury and concerning which petitioner had no opportunity to cross-examine.

6. Whether or not petitioner was denied his constitutional right to a trial according to due process of law, and substantial error committed justifying a reversal of the judgment by reason of the Court's charge to the jury that it might take into consideration circumstances not supported by evidence.

7. Whether or not the conspiracy to transport stolen bonds in interstate commerce may be established by overt acts committed after the bonds had come to rest.

Reasons for Granting Writ.

It is respectfully submitted that the trial of the case before the jury which had listened to the opening of the said Chester G. Bollenbach was not before a fair and impartial jury required by due process of law, and that the said jury should have been discharged by the Court of its own motion and not permitted to decide the case as to Peter W. Burns.

That the admission of testimony of other crimes committed by the defendant Turley over the objection of the said Peter W. Burns and was not evidence admissable against him.

Also that no competent evidence was produced upon the trial to support the judgment of conviction. Instead, how-

ever, despite the constitutional guarantees in favor of every accused, the jury was permitted to predicate its verdict on guess, speculation and inferences unsupported by evidence, and was instructed that it might take into consideration circumstances wholly unsupported by any evidence as the result of which petitioner was denied a trial according to due process of law, and in addition, was denied his constitutional right of being confronted with the witnesses against him and the right to cross examination. All of these errors were substantial, and justified a reversal of the judgment.

Therefore, petitioner respectfully prays that this petition for a Writ of Certiorari to review the judgment of the Circuit Court of Appeals herein be granted.

PETER W. BURNS,
Petitioner,

By ALEX SIMPSON,
Attorney for Petitioner.

Questions Presented and Statement of the Case.

A statement of the facts and the questions involved will be found in the petition.

Specification of Errors to be Urged.

1. The petitioner-defendant was deprived of, "Due Process of Law", in that he was not tried by a fair and impartial jury, and did not have, "A trial by an impartial jury".

2. Petitioner-defendant was deprived of due process of law, in that evidence was admitted at the trial, of crimes committed by a joint defendant in the indictment, which crimes were not similar to the crime charged in the indictment, and thereby petitioner-defendant was not, "confronted with the witnesses against him."

3. No competent evidence was adduced to prove any of the crimes charged in the indictment, and there was a failure of proof with reference to both the first and second counts of such indictment.

4. Due process of law was denied petitioner-defendant in that the verdict of the jury and the decision of the Circuit Court of Appeals were predicated only on inferences, suppositions, conjecture and guess.

5. The reading into evidence of the testimony of the defendant Jacobson, given before the Grand Jury was a violation of the constitutional right of the petitioner-defendant to be confronted by the witnesses against him and a violation of his right to cross examination.

6. The Court's charge to the jury that it might take into consideration circumstances not supported by evidence, was substantial error justifying a reversal of the judgment, and was a denial of the constitutional right to trial according to due process of law.

7. The evidence wholly failed to establish that petitioner transported or caused the transportation in Interstate Commerce of any securities, or that he knew that any securities had been stolen, or would be transported in Interstate Commerce, has wholly failed to establish that peti-

tioner-defendant was engaged in any conspiracy for such purpose, or that he knew of any existence of such conspiracy, or that he did anything in furtherance thereof.

8. That attempted proof of the commission of Overt acts subsequent to the time when the securities in question came to rest, was wholly improper, since such acts could not be in furtherance of a conspiracy, inasmuch as the conspiracy to transport in Interstate Commerce must necessarily have terminated when the bonds came to rest in New York.